Excel DPM of Arkansas, Inc., a Division of Cargill, Inc. *and* United Food and Commercial Workers International Union, Local 2008, AFL–CIO. Case 26–CA–17579

October 30, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

Upon a charge filed on July 29, 1996, by United Food and Commercial Workers International Union, Local 2008, AFL–CIO (the Union), the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on August 12, 1996, alleging that the Respondent has violated Section 8(a)(1) of the National Labor Relations Act by threatening its employees with the loss of 401(k) pension plan and Employee Stock Ownership Plan (ESOP) benefits if the employees chose the Union as their bargaining representative. On August 22, 1996, the Respondent filed an answer admitting in part and denying in part the complaint allegations and requesting that the complaint be dismissed in its entirety.

On January 28, 1997, the General Counsel filed a Motion to Transfer Case to Board and for Summary Judgment, with exhibits attached. On January 30, 1997, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response and a procedural memorandum in opposition to the General Counsel's motion.[1]

Ruling on Motion for Summary Judgment

The complaint alleges that the Respondent issued memoranda on July 17 and 20, 1996, to its Booneville, Arkansas employees, and that these memoranda unlawfully threatened the loss of 401(k) pension plan and Employee Stock Ownership Plan (ESOP) benefits if the employees chose the Union as their bargaining representative. The General Counsel contends that the Respondent's answer to the complaint does not raise any issue warranting a hearing, that the Respondent has admitted making the statements at issue, and, under controlling Board precedent, that these statements undisputedly conveyed unlawful threats of the withdrawal of benefits in violation of Section 8(a)(1).

The Respondent admits that Plant Manager Ed Whipkey's name appeared on the July 17 and 20 memoranda addressed to all Booneville employees.[2] The Respondent contends that the memoranda, when read in their entirety, did not express the Respondent's intent automatically to withdraw any 401(k) or ESOP benefits if the employees voted for a union. Instead, the Respondent argues, the memoranda abided by the well-established principle that an employer may lawfully tell employees that, if a union wins an election, existing benefits are negotiable and may be lost as a result of the negotiating process.

The July 17 memorandum, entitled ''Union Authorization Cards,'' stated, in relevant part:

> Here we go again! Local 2008 and their supporters are back at it with their same old tired sayings and empty promises. They would love to

[1] The Respondent contends that the General Counsel's Motion for Summary Judgment should be rejected as untimely, because it was not filed ''promptly'' as required by Sec. 102.24(b) of the Board's Rules and Regulations. We reject this contention. There is no indication, and the Respondent does not allege, that the Respondent has suffered prejudice due to the 5 months that elapsed between the General Counsel's receipt of the answer and the filing of the motion. In the absence of any showing of prejudice, we regard the motion as having been filed within the requirements of the Rule. Additionally, we reject the Respondent's suggestion that Rule 6 of the Federal Rules of Civil Procedure in some way defines ''promptness'' and that that definition should apply here. The Board provides that the Board proceedings are to be conducted pursuant to the FRCP only ''so far as is practicable.'' Thus, the FRCP are not necessarily controlling. See, e.g., *M. J. Santulli Mail Services*, 281 NLRB 1288, 1290 (1986); *East Texas Motor Freight*, 262 NLRB 868, 904 (1982). Moreover, Rule 6(a) of the Federal Rules of Civil Procedure does not contain any definition of promptness relevant to the summary judgment motion at issue here.

[2] The Respondent's answer admits that Whipkey is a supervisor within the meaning of Sec. 2(11) but denies that he is its agent within the meaning of Sec. 2(13). It is well settled, however, that a 2(11) supervisor of an employer is a 2(13) agent of that employer. E.g., *Ideal Elevator Corp*., 295 NLRB 347 fn. 1 (1989); *Dorothy Shamrock Coal Co*., 279 NLRB 1298, 1299 (1986), enfd. 833 F.2d 1263 (7th Cir. 1987). The Respondent also contends that although it admitted in its answer that ''on or about July 17 and 20, 1996, Ed Whipkey's name appeared on memoranda addressed to all Booneville employees and that purported copies of the memoranda were attached as Exhibit A and B to the Complaint,'' it did not admit ''the issuance of memoranda on July 17, 1996 and July 20, 1996 to all Booneville, Arkansas employees'' and, therefore, the General Counsel has failed to satisfy his burden of proof. This contention is without merit. It is well settled that in order to put in issue a fact established by an exhibit attached to a Motion for Summary Judgment, the respondent may not rely on a general denial or failure to admit but must specifically controvert the contents of that exhibit. See, e.g., *Westinghouse Electric Corp*., 240 NLRB 731, 732 (1979), and cases cited therein. The Respondent here has not denied the authenticity of complaint Exhs. A and B or averred that they are anything other than what they appear on their face to be: communications from a management official to unit employees conveying the Respondent's position regarding the consequences of unionization. Accordingly, we deem the complaint allegations to be admitted insofar as they allege that the Respondent disseminated the memoranda to unit employees. We further find that there are no material issues warranting a hearing raised by those portions of the Respondent's answer that admit the essential allegations of complaint pars. 2, 4, and 5, but deny ''the remaining allegations'' in those paragraphs. Finally, with regard to par. 1 of the complaint, the Respondent has admitted that it had received notice that the charge was filed against it but also denied ''the remaining allegations'' of that paragraph, presumably that ''[t]he charge in this proceeding was filed by the Union on July 29, 1996.'' The Respondent has failed, however, to refute the authenticity of the proof attached as exhibits to the General Counsel's motion. Once again, therefore, we find that there is no issue concerning the filing of the charge that warrants a hearing.

have you believe that you can get something for nothing. They would love to have you believe that all you have to do is sign their authorization cards and everything will be better. They would love to have you believe that you have nothing to lose and everything to gain. WRONG! Again, let there be no misunderstanding. We strongly oppose union representation in Booneville and will fight hard to keep the union out.

1. All of you participate in the Employee Stock Ownership Plan (ESOP) benefit. Some of you participate in the 401k match benefit. All of you have received quarterly benefit statements. Most of you recognize that this is a superior benefit. If you sign a union authorization card, you take a good chance of losing this benefit. No Excel or Cargill unionized facility has this benefit and it is company policy that it not be a benefit in unionized facilities. Are you willing to go on STRIKE during which there is NO WORK, NO WAGES, NO BENEFITS if the company were to insist during the negotiating process that this benefit be eliminated.

2. All of you have superior benefits to Excel unionized facilities in many areas: holidays, vacations, just to name a few areas. If you sign a union authorization card, you take a chance on having these benefits reduced. If you were represented by a union, do you really think that the company would let the Booneville plant retain these benefits when it doesn't in any of its unionized facilities? Do you really think Booneville would set the standard in benefits for Excel's unionized facilities? More importantly, are you willing to go on STRIKE if the company were to insist during the negotiating process that these benefits be reduced?

The July 20 memorandum, entitled ''401k/ESOP Benefit,'' stated in relevant part:

Union supporters are saying that the company can't take the 401k/ESOP match benefit away from you. They are not telling you the truth. Here are the facts:

1. FACT: The money you have personally invested is yours and cannot be taken away.

. . . .

3. FACT: The 401k/ESOP benefit can be taken away during the negotiating process. Again, ask yourself if you truly believe that the company won't insist that the 401k/ESOP benefit be taken away during the negotiating process when NO other Excel unionized facility has this benefit. Do you really think that the Booneville plant of 500 employees is going to set the standard for other Excel plants? More importantly, you must ask yourself, am I willing to go on STRIKE if the company insists that this benefit be taken away during the negotiating process?

After considering the two memoranda in their entirety, as the Respondent has urged us to do, we agree with the General Counsel that, as a matter of law, their undisputed language conveys an unlawful threat to withdraw 401(k) pension and ESOP benefits if the employees chose the Union as their bargaining representative. Contrary to the Respondent's claims, the memoranda do not simply state that employees may lose these benefits as a result of good-faith collective-bargaining negotiations. Instead, they emphasize the inevitability of loss and the intractability of the Respondent's view, in advance of any negotiations, that unionized employees are not entitled and will not be permitted to participate in the Company's 401(k) and ESOP plans. It is unlawful for an employer to threaten such a loss. See, e.g., *Tappan Co*., 228 NLRB 1389, 1390 (1977), enfd. 607 F.2d 764 (6th Cir. 1979); *Rangaire Corp*., 157 NLRB 682, 683–684 (1966).[3]

We find no merit in the Respondent's contention that it gave affirmative assurances which clarified that a loss of benefits was not inevitable. The statement in the July 20 memorandum that ''[t]he money you have personally invested is yours and cannot be taken away'' sheds no light on the employees' future participation in the benefit plans. Furthermore, the Respondent's token references to the negotiating process in both memoranda do not convey any real sense of an intent to bargain in good faith about the 401(k) and ESOP benefits. Instead, employees reading the full text of each memorandum would reasonably conclude that the Respondent intended to enter any collective-bargaining negotiations with an intransigent resolve to eliminate those benefits for unit employees, not because of cost or any other nondiscriminatory factor, but solely because of the employees' unionized status. As the Respondent most unequivocally stated in the July 17 memorandum, ''No Excel or Cargill unionized facility has this benefit and it is company policy that it not be a benefit in unionized facilities.'' In sum, to refer to the negotiating process after flatly stating that unionized employees would not have the 401(k) and ESOP benefits ''is to underscore the power of the Employer to carry out its threat and to expose the Employer's intention to skirt its duty to bargain in good

[3] The Respondent relies in part on *Dayton Hudson Corp*., 316 NLRB 85 (1995). We find that case inapposite. In the first place, we note that the Board did not pass on the judge's dismissal of the 8(a)(1) allegations in that case. Ibid. at fn. 1. Second, the case is distinguishable on its facts. Although the employer there noted that unrepresented employees had a savings plan, and unionized employees did not, the employer said that these matters were negotiable, and the employer did not suggest than an intransigent position would be taken in those negotiations.

faith.'' *International Harvester Co.*, 258 NLRB 1162 fn. 3 (1981).

Based on the foregoing, we find that the Respondent's answer raises no issues warranting a hearing and that the General Counsel is entitled to prevail on all allegations of the complaint. We therefore grant the General Counsel's Motion for Summary Judgment.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation with an office and place of business in Booneville, Arkansas, where it has been engaged in the processing of beef products. During the 12-month period ending July 31, 1996, the Respondent, in conducting its business operations, sold and shipped from its facility goods valued in excess of $50,000 directly to points located outside the State of Arkansas. It has also purchased and received at its facility goods valued in excess of $50,000 directly from points located outside the State of Arkansas. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

By memoranda dated July 17 and 20, 1996, signed by Plant Manager Ed Whipkey and issued to all employees at the Respondent's Booneville, Arkansas facility, the Respondent threatened its employees with the loss of 401(k) pension plan and Employee Stock Ownership Plan (ESOP) benefits if the employees chose the Union as their bargaining representative. We find that by this conduct the Respondent interfered with, restrained, and coerced employees in the exercise of the rights guaranteed them in Section 7 of the Act. Such conduct violated Section 8(a)(1) of the Act.

CONCLUSION OF LAW

By issuing memoranda on July 17 and 20, 1996, threatening employees with the loss of 401(k) pension plan and Employee Stock Ownership Plan (ESOP) benefits if the employees chose the Union as their bargaining representative, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(1) of the Act, we shall order it to cease and desist and to post the appropriate remedial notice to employees.

ORDER

The National Labor Relations Board orders that the Respondent, Excel DPM of Arkansas, Inc., a division of Cargill, Inc., Booneville, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with the loss of 401(k) pension plan and Employee Stock Ownership Plan (ESOP) benefits if the employees choose the Union as their bargaining representative.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any material. In the event that the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 29, 1996.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with the loss of 401(k) pension plan and Employee Stock Ownership Plan (ESOP) benefits if the employees choose the Union as their bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

EXCEL DPM OF ARKANSAS, INC., A DIVISION OF CARGILL, INC.